

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 9 CFR Parts 1 and 3

[Docket No. 93-076-2]

RIN 0579-AA59

#### Animal Welfare; Marine Mammals

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** We are proposing to amend the Animal Welfare regulations to establish standards for "swim-with-the-dolphin" interactive programs. These proposed standards would be promulgated under the authority of the Animal Welfare Act and appear to be necessary to ensure that the marine mammals used in these programs are handled and cared for in a humane manner.

**DATES:** Consideration will be given only to comments received on or before February 22, 1995.

**ADDRESSES:** Please send an original and three copies of your comments to Chief, Regulatory Analysis and Development, PPD, APHIS, USDA, P.O. Drawer 810, Riverdale, MD 20738. Please state that your comments refer to Docket No. 93-076-2. Comments received may be inspected at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect comments are requested to call ahead on (202) 690-2817 to facilitate entry into the comment reading room.

**FOR FURTHER INFORMATION CONTACT:** Dr. Barbara Kohn, Senior Staff Veterinarian, Animal Care Staff, Regulatory Enforcement and Animal Care, APHIS, USDA, P.O. Drawer 810, Riverdale, MD 20738. The telephone number for the agency contact will change when agency offices in Hyattsville, MD, move to Riverdale, MD,

during February 1995. Telephone: (301) 436-7833 (Hyattsville); (301) 734-8699 (Riverdale).

#### SUPPLEMENTARY INFORMATION:

##### Background

Since 1979, the Departments of Commerce and the Interior have shared jurisdiction with the Department of Agriculture for regulating the care and transportation of captive marine mammals. Under the Animal Welfare Act (7 U.S.C. §§ 2131, *et seq.*) (AWA), authority was given by Congress to the Department of Agriculture to promulgate regulations and standards for the humane handling, care, treatment, and transportation of captive marine mammals by regulated entities. In 1979, the Department published a final rule in the **Federal Register** (44 FR 36868) which set forth the regulations and standards for captive marine mammals.

The AWA regulations are contained in title 9 of the Code of Federal Regulations, chapter 1, subchapter A, parts 1, 2, and 3. Part 1 provides definitions of the terms used in parts 2 and 3. Part 2 sets forth the regulations and part 3 sets forth the standards for the humane handling, care, treatment, and transportation of covered animals by regulated entities. Subpart E of part 3 contains the standards applicable to marine mammals.

Under provisions of the Marine Mammal Protection Act of 1972 (16 U.S.C. §§ 1361 *et seq.*) (MMPA), the Departments of Commerce and the Interior have had the responsibility for regulating marine mammals in the wild, and those removed from the wild and held in captivity. Such authority is exercised through a permit system whereby permits to obtain new marine mammals or replacements from the wild are issued, provided that the applicants for such permits comply with provisions of these permits with respect to the handling and care of the animals. The National Marine Fisheries Service (NMFS), U.S. Department of Commerce, regulated "swim-with-the-dolphin" (SWTD) programs, by incorporating standards of care into the permits. In SWTD programs, members of the public participate in an orientation and education program regarding marine mammals, and then take part in an interactive swimming session with dolphins.

Recently, the regulation of SWTD programs has significantly changed. The April 30, 1994, amendments to the MMPA contain a requirement that holders of marine mammal permits issued by NMFS be licensed by USDA under the AWA. The NMFS permits have changed in that the special conditions concerning standards of care imposed on SWTD permit holders are no longer contained in the permits. Therefore, there are no specific standards in place for SWTD programs.

Although 9 CFR part 3, subpart E contains general standards, developed and enforced by APHIS, for the housing, care, treatment, and transportation of marine mammals, it contains no standards that apply specifically to SWTD programs. Specific APHIS standards for these programs, including exhibit design, veterinary care, personnel training, and recordkeeping, were to be addressed in APHIS's review and anticipated proposed revision of the regulations. As part of this anticipated revision of the regulations, APHIS published an advance notice of proposed rulemaking on July 23, 1993, (58 FR 39458) in which members of the public were invited to submit comments on appropriate specific standards for the care of marine mammals at facilities licensed by or registered with APHIS. The amendments to the MMPA, and the elimination of the MMPA requirement for NMFS to specify conditions for the care and transportation of captive marine mammals used in SWTD programs, has precipitated a need for specific APHIS standards regarding SWTD programs at this time. Therefore, we are proposing such standards to ensure the safety and health of captive marine mammals used in SWTD programs.

#### Program Animals

This rule proposes standards for SWTD in a new § 3.111. We are providing in proposed § 3.111(d) that only *Tursiops truncatus*, commonly referred to as bottlenose dolphins, may be used in SWTD programs. Industry experience has demonstrated that *Tursiops truncatus* can be adequately trained and conditioned to interact safely with humans. Similar information is not yet available regarding other species of cetaceans.

### Space Requirement

We are proposing to require in § 3.111(a) that primary enclosures used to contain dolphins that are used in SWTD programs consist of three areas: An interactive area, a buffer area, and a sanctuary area. Both the buffer area and the sanctuary area would be off-limits to members of the public. The sanctuary area is necessary to allow dolphins to separate themselves voluntarily from the area of the enclosure where humans are permitted during program sessions. The buffer area, situated between the interactive area and the sanctuary area, is necessary to ensure that the sanctuary area is an adequate distance from the interactive area to ensure dolphins the opportunity for complete freedom from the public.

We would establish the same minimum space requirements for each of the three required areas. Each of the areas would be required to meet minimum space requirements for horizontal dimension, surface area, depth, and volume. Each of these proposed space requirements exceeds that in the current regulations for *Tursiops truncatus*. The space requirements set forth in this proposed rule were developed in conjunction with professional industry organizations, and were recommended by those organizations as providing adequate space for the health and well-being of dolphins used in the SWTD programs.

We believe the increased space is necessary in the interactive area to accommodate the presence of both dolphins and humans, and that a like

amount of space is necessary in both the buffer area and the sanctuary area, so that the buffer and sanctuary areas are not made intentionally uninviting to participating dolphins. For the same reason, we would prohibit the restriction of a dolphin's entrance into the buffer and sanctuary areas. In our view, SWTD programs are not to be forced contact programs. The dolphins must always have the choice not to participate. In this regard, the dolphin's choice of area should not be influenced by factors such as restricted entrance into an area or differences between sizes of areas (e.g., a sanctuary area that is smaller than the interactive area).

The minimum space requirements for the three required areas and for the entire primary enclosure are set forth in proposed § 3.111(a)(5) in a table which is replicated below.

MINIMUM SPACE REQUIREMENTS FOR EACH AREA AND PRIMARY ENCLOSURE

| Number of animals            | Minimum horizontal dimension |                  | Surface area                 |                              | Depth            |                  | Volume                       |                              |
|------------------------------|------------------------------|------------------|------------------------------|------------------------------|------------------|------------------|------------------------------|------------------------------|
|                              | Each area (ft)               | Enclosure (ft)   | Each area (ft <sup>2</sup> ) | Enclosure (ft <sup>2</sup> ) | Each area (ft)   | Enclosure (ft)   | Each area (ft <sup>3</sup> ) | Enclosure (ft <sup>3</sup> ) |
| 1-2 .....                    | 27                           | 81               | 572                          | 1,716                        | 9                | 9                | 5,148                        | 15,444                       |
| 3 .....                      | 27                           | 81               | 1,144                        | 3,432                        | 9                | 9                | 10,296                       | 30,888                       |
| Each additional animal ..... | ( <sup>1</sup> )             | ( <sup>1</sup> ) | 254                          | 763                          | ( <sup>1</sup> ) | ( <sup>1</sup> ) | 2,289                        | 6,867                        |

<sup>1</sup> No change.

Proposed section 3.111(a) also sets forth the formulae used to arrive at the space requirements, which are based on the average adult body length of *Tursiops truncatus* (9 feet) and which assume use of a circular pool. The measurements in the table were calculated as follows.

1. *Horizontal dimension.* The minimum horizontal dimension for each area would be at least three times the average adult body length of the species of animal used in the program. As noted above, under this proposed rule, only *Tursiops truncatus* would be allowed in SWTD programs.

2. *Surface area.* The minimum surface area for each of the three required areas would be based on the following formulae:

*Up to two dolphins*

$$\text{Surface Area (SA)} = \left( \frac{3 \times \text{average adult body length (L)}}{2} \right)^2 \times 3.14$$

*Three dolphins*

$$\text{SA} = \left( \frac{3 \times \text{L}}{2} \right)^2 \times 3.14 \times 2$$

*Additional SA for each animal in excess of three*

$$\text{SA} = \left( \frac{2 \times \text{L}}{2} \right)^2 \times 3.14$$

3. *Depth.* The average depth for each area would be required to be at least 9 feet.

4. *Volume.* The minimum volume required for each animal would be based on the following formula:

$$\text{Volume} = \text{SA} \times 9$$

### Water Quality

Standards for water quality for marine mammals are set forth in existing § 3.106. In § 3.111(b) of this proposed rule, we are providing that SWTD programs must also maintain sufficient water clarity so that attendants are able to observe dolphins and humans at all times within the interactive area. If the level of water clarity does not allow these observations to be made, the interactive sessions would be required to be canceled until such clarity is achieved.

### Personnel

In proposed § 3.111(c), we are setting forth minimum requirements for the type and number of personnel necessary for operating a SWTD program. Additionally, we are proposing to set forth minimum levels of experience necessary for each required employee. We believe this experience is necessary to ensure that these individuals have been exposed to the critical elements of safe human/dolphin interactions.

In this proposed rule, we are providing that each SWTD program must have, at the minimum, the following personnel with the following backgrounds:

(1) Licensee or manager—at least one full-time staff member with at least 6 years in a professional or managerial position dealing with captive cetaceans;

(2) Primary behaviorist—at least one full-time staff member with at least 6 years experience in training cetaceans for SWTD behaviors, or with an equivalent amount of experience involving in-water training of cetaceans, who serves as the head trainer for the SWTD program;

(3) Supervising attendant—at least one full-time staff member with at least 3 years experience involving human/dolphin interactions;

(4) Attending veterinarian—at least one staff or consultant veterinarian who has had at least the equivalent of 2 years experience with cetacean medicine within the past 10 years.

A separate individual would be required to fill each of the required positions.

### Handling

We are providing in proposed § 3.111(e)(1) that time dolphins spend interacting with humans as part of a SWTD program may not exceed 2 hours per day, and that each participating dolphin must have no less than 10 continuous hours without public interaction in each 24 hours. We are providing in proposed § 3.111(e)(2) that all dolphins used in the session must be adequately conditioned and trained for interaction, so that they respond in the session to the attendants with appropriate behavior for safe interaction.

We are also providing in proposed § 3.111(e)(3) that the ratio of human participants to dolphins shall not exceed 3:1, and that the ratio of human participants to attendants shall not exceed 3:1. These ratios are based on permit requirements established by NMFS as part of their regulation of SWTD programs, and, based on MNFS' enforcement experience, we believe they are adequate to protect dolphins used in SWTD programs.

Under § 3.111(e)(5) of this proposed rule, all sessions must have at least two attendants, and more if required according to the ratio discussed above. At least one attendant would be required to be positioned in the water, except in cases where at least one attendant is positioned so as to be able to intervene during the interactive session as quickly as if positioned in the water. However, if the program has had more than two incidents during interactive sessions that have been dangerous or harmful to either dolphins or humans, at least one attendant would

be required to be positioned in the water.

To help ensure that the requirements of this proposed rule regarding interactive sessions are met, we are requiring in § 3.111(e)(4) that, prior to participation in a SWTD program, members of the public be provided with, and agree in writing to abide by, the SWTD program rules. We are also proposing that any participant who fails to follow the rules or the instructions of the attendants be removed from the session.

Under § 3.111(e)(6) of this proposed rule, a SWTD program must limit contact between humans and dolphins so as to ensure that the dolphins and humans are not harmed, that the element of choice regarding interaction is not removed from the dolphins (such as by recalling the animal from the sanctuary area), and that undesirable behavior is not elicited from the dolphins. At all times, each dolphin must be free to remove itself from the human/dolphin interaction. To ensure that this is possible, grasping or holding of the dolphin's body, unless under the direct and explicit instruction of an attendant eliciting a specific dolphin behavior, and the chasing or harassing of dolphins, would be prohibited by the SWTD programs.

We would require in proposed § 3.111(e)(7) that, in cases where animals used in the program exhibit unsatisfactory behaviors, such as charging, biting, mouthing, or sexual contact between dolphins and humans, these animals must be removed from the interactive session. We recognize that, in some cases, it may become difficult or impossible to remove a particular animal from an interactive session. For instance, in some cases, an animal may refuse to respond to commands from attendants. In order for a facility to anticipate and respond to such situations, we would require that written criteria must be developed and submitted to APHIS regarding conditions and procedures for the termination of a session. The primary behaviorist shall determine when operations will be terminated, and when they may resume. In the primary behaviorist's absence, these determinations shall be made by the supervising attendant.

### Recordkeeping

We would establish reporting and recordkeeping requirements for SWTD programs. This information would help us monitor compliance with the regulations, and assist us in evaluating SWTD programs to assess the effectiveness of the regulations.

As part of the reporting requirements, we would require in § 3.111(f)(1) that a description of each SWTD program be provided to APHIS at least 30 days prior to initiation of any SWTD program.

Facilities which have programs in place when this rule becomes final would also be required to provide APHIS with the same information within thirty days after the rule becomes final. This description would be required to include, at the minimum, the following: (1) Identification of each dolphin in the program by means of name and/or number, sex, age, and any other means determined by the Administrator as necessary to adequately identify the dolphin; (2) a description of the educational content and agenda of planned interactive sessions, and the anticipated average and maximum frequency and duration, of encounters per dolphin per day; (3) the content and method of pre-encounter orientation, rules, and instructions, including restrictions on types of physical contact with the dolphins; (4) a description of the SWTD facility, including the primary enclosure and other housing at the facility; (5) a description of the training the dolphin has undergone or will undergo prior to the participation in the program; (6) *curriculum vitae* for all staff involved in the handling, care, and maintenance of the dolphins; (7) the current behavior patterns and health of each dolphin, to be assessed and submitted by the attending veterinarian; (8) a written program of veterinary care (APHIS form 7002), including protocols and schedules of professional visits; and (9) a detailed description of the monitoring program to be used to detect and identify changes in the behavior and health of the dolphins.

We would require in § 3.111(f)(3) and (4) that the following records be kept at the SWTD site and be made available to an APHIS official upon request during normal business hours: (1) Individual dolphin veterinary records, including all examinations, lab reports, treatments, and necropsy reports; (2) individual dolphin feeding records; and (3) individual dolphin behavioral records. The veterinary records would be required to be kept at the site at least 5 years. The feeding and behavioral records would be required to be kept at the site at least 3 years.

Under § 3.111(f)(5) of this proposed rule, the following reports would be required to be kept at the SWTD site at least 3 years, and a copy would be required to be submitted to the Administrator on a semi-annual basis: (1) Statistical summaries of the number of minutes per day and the number of hours per week that each animal

participated in an interactive session; (2) a statistical summary of the number of human participants per month in the SWTD program; and (3) a description of any changes made in the SWTD program since the previous report was submitted.

We would also require, in § 3.111(f)(6), that any incident resulting in injury to either dolphins or humans during an interactive session be reported to APHIS within 24 hours of the incident. Within a week of any such incident, a written report would be required to be submitted to the Administrator. The report would be required to provide a detailed description of the incident and must establish a plan of action for the prevention of further occurrences.

#### **Veterinary Care**

In § 3.111(g) of this proposed rule, we are establishing standards for veterinary care and veterinary supervision for SWTD programs. The veterinary care standards set forth in this rule are based on documents developed at a NMFS-sponsored workshop by experts in marine mammal medicine and parties experienced in dealing with SWTD animals. We consider these veterinary care standards necessary to safeguard the health of both dolphins and humans participating in interactive programs. The veterinary requirements, discussed below, would require regular monitoring by the attending veterinarian of dolphins used in the programs and of other aspects of the program. This regular monitoring is necessary to help prevent the spread of zoonotic diseases during the program. Additionally, because dolphins often do not exhibit clinical signs of illness until very late in the disease process, early detection of stress or health problems is essential for the well-being of the dolphins.

In § 3.111(g)(1) of this proposed rule, we are requiring that the attending veterinarian conduct on-site evaluations at least once a month of each dolphin used in a SWTD program. The evaluation would have to include a visual inspection of the animal; examination of the behavioral, feeding, and medical records of the animal; and a discussion of each animal with an animal care staff member familiar with the animal. We would require in § 3.111(g)(2) that the attending veterinarian observe an interactive swim sessions at least once a month.

Additionally, under proposed § 3.111(g)(3), the attending veterinarian would be required to conduct a complete physical examination of each dolphin at least once every 6 months. The examination would have to include

a profile of the dolphin, including the following: The dolphins's identification (name and/or number, sex, and age), weight, length, axillary girth, appetite, and behavior. The attending veterinarian would also be required to conduct a general examination to evaluate body condition, skin, eyes, mouth, blow hole and cardio-respiratory system, genitalia, and feces (gastrointestinal status). In addition, the examination would have to include a complete blood count and serum chemistry analysis, and cytology and parasite evaluation of fecal and blow hole smears. As part of the examination, the attending veterinarian would be required to record the nutritional and reproductive status of the dolphin (whether in active breeding program, pregnant, or nursing). While at the site, the attending veterinarian would also be required to examine water quality records and make an assessment of the overall water quality during the preceding month.

In proposed § 3.111(g)(6), we are providing that, should a dolphin used in a SWTD program die, complete necropsy results, including all appropriate histopathology, must be recorded in the animal's individual file and be made available to APHIS officials during facility inspections, or as requested by APHIS. The necropsy would be required to be performed within 48 hours of the dolphin's death, by a veterinarian experienced in marine mammal necropsies. If the necropsy is not to be performed within 3 hours of the discovery of the dolphin's death, the dolphin must be refrigerated. We would require that written results of the necropsy be available in the dolphin's individual file within 7 days after death for gross pathology and within 45 days after death for histopathology.

#### **Executive Order 12866 and Regulatory Flexibility Act**

This proposed rule has been determined to be significant and was reviewed by OMB under Executive Order 12866.

Under this proposed rule, operators of SWTD programs would be required to meet specified standards for those programs. These standards would include requirements for handling, facility design, reporting, and recordkeeping. Currently, 135 exhibitors in the United States are licensed by APHIS to hold marine mammals. Of this number, four operate SWTD programs. Three of these four exhibitors already meet the standards we are proposing. The fourth exhibitor would have to make certain design changes and provide for additional training to

comply with the proposed standards. The cost of the additional training requirements would be approximately \$15,000. The estimated costs of materials to complete the design changes would be approximately \$850. Based on information provided by the industry concerning the average annual gross revenue of SWTD programs, the additional costs involved in complying with the proposed standards should not pose a significant economic burden on exhibitors.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action would not have a significant economic impact on a substantial number of small entities.

#### **Executive Order 12778**

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. It is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. The Act does not provide administrative procedures which must be exhausted prior to a judicial challenge to the provisions of this rule.

#### **Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this proposed rule will be submitted for approval to the Office of Management and Budget. Please send written comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503. Please send a copy of your comments to: (1) Chief, Regulatory Analysis and Development, PPD, APHIS, USDA, P.O. Drawer 810, Riverdale, MD 20738, and (2) Clearance Officer, OIRM, USDA, room 404-W, 14th Street and Independence Avenue SW., Washington, DC 20250.

#### **List of Subjects**

##### **9 CFR Part 1**

Animal welfare, Animal housing, Dealers, Exhibitors, Humane animal handling, Research facilities.

##### **9 CFR Part 3**

Animal welfare, Humane animal handling, Pets, Reporting and recordkeeping requirements, Transportation.

Accordingly, 9 CFR parts 1 and 3 would be amended as follows:

**PART 1—[AMENDED]**

1. The authority citation for part 1 would continue to read as follows:

**Authority:** 7 U.S.C. 2131–2159; 7 CFR 2.17, 2.51, and 371.2(g).

2. In § 1.1, definitions of *buffer area*, *interactive area*, *interactive session*, *sanctuary area*, and *swim-with-the-dolphins (SWTD) program* would be added in alphabetical order, to read as follows:

**§ 1.1 Definitions.**

\* \* \* \* \*

*Buffer area* means that area in a primary enclosure for a swim-with-the-dolphins program that is off-limits to members of the public and that directly abuts the interactive area.

\* \* \* \* \*

*Interactive area* means that area in a primary enclosure for a swim-with-the-dolphins program where an interactive session takes place.

*Interactive session* means a swim-with-the-dolphins program session where members of the public enter a

primary enclosure to swim with dolphins.

\* \* \* \* \*

*Sanctuary area* means that area in a primary enclosure for a swim-with-the-dolphins program that is off-limits to the public and that directly abuts the buffer area.

\* \* \* \* \*

*Swim-with-the-dolphins SWTD program* means any human-dolphin interactive program in which a member of the public enters the primary enclosure in which a dolphin is housed to interact with the animal. This excludes feeding and petting pools and the participation of any member(s) of the public audience as a minor segment of an educational show.

\* \* \* \* \*

**PART 3—[AMENDED]**

3. The authority citation for part 3 would be revised to read as follows:

**Authority:** 7 U.S.C. 2131–2159; 7 CFR 2.17, 2.51, and 371.2(g).

4. In subpart E, footnote 2 would be redesignated as footnote 3, footnote 5 would be redesignated as footnote 2,

footnote 8 would be redesignated as footnote 4, and footnote 9 would be redesignated as footnote 5.

5. A new section § 3.111 would be added to read as follows:

**§ 3.111 Swim-with-the-dolphins programs.**

Swim-with-the-dolphins programs must comply with the requirements in this section, as well as with all other requirements of this subpart pertaining to dolphins.

(a) *Space requirements.* The primary enclosure for SWTD dolphins must contain an interactive area, a buffer area, and a sanctuary area. Movement of dolphins into the buffer or sanctuary area must not be restricted. Notwithstanding the space requirements set forth in § 3.104, each of the three areas required for SWTD programs must meet the following space requirements:

(1) The horizontal dimension for each area must be at least three times the average adult body length of the species of dolphin used in the program.

(2) The minimum surface area required for each area is calculated as follows:

(i) *Up to two dolphins:*

$$\text{Surface Area (SA)} = \left( \frac{3 \times \text{average adult body length (L)}}{2} \right)^2 \times 3.14$$

(ii) *Three dolphins:*

$$\text{SA} = \left( \frac{3 \times L}{2} \right)^2 \times 3.14 \times 2$$

(iii) *Additional SA for each animal in excess of three:*

$$\text{SA} = \left( \frac{2 \times L}{2} \right)^2 \times 3.14$$

(3) The average depth for each area must be at least 9 feet.

(4) The minimum volume required for each animal is calculated as follows:

$$\text{Volume} = \text{SA} \times 9$$

(5) Minimum space requirements for each area are summarized in Table VI.

TABLE VI.—MINIMUM SPACE REQUIREMENTS FOR EACH AREA AND PRIMARY ENCLOSURE—SWTD

| Number of animals            | Minimum horizontal dimension |                  | Surface area                 |                              | Depth            |                  | Volume                       |                              |
|------------------------------|------------------------------|------------------|------------------------------|------------------------------|------------------|------------------|------------------------------|------------------------------|
|                              | Each area (ft)               | Enclosure (ft)   | Each area (ft <sup>2</sup> ) | Enclosure (ft <sup>2</sup> ) | Each area (ft)   | Enclosure (ft)   | Each area (ft <sup>3</sup> ) | Enclosure (ft <sup>3</sup> ) |
| 1–2 .....                    | 27                           | 81               | 572                          | 1,716                        | 9                | 9                | 5,148                        | 15,444                       |
| 3 .....                      | 27                           | 81               | 1,144                        | 3,432                        | 9                | 9                | 10,296                       | 30,888                       |
| Each additional animal ..... | ( <sup>1</sup> )             | ( <sup>1</sup> ) | 254                          | 763                          | ( <sup>1</sup> ) | ( <sup>1</sup> ) | 2,289                        | 6,867                        |

<sup>1</sup> No change.

(b) *Water quality.* Sufficient water clarity must be maintained so that attendants are able to observe dolphins and humans at all times while within the interactive area. If water clarity does not allow these observations, the interactive sessions must be canceled until the required clarity is provided.

(c) *Employees and attendants.* Each SWTD program must have, at the

minimum, the following personnel, with the following minimum backgrounds (each position must be held by a separate individual):

- (1) Licensee or manager—at least one full-time staff member with at least 6 years in a professional or managerial position dealing with captive cetaceans;
- (2) Primary behaviorist—at least one full-time staff member with at least 6 years experience in training cetaceans

for SWTD behaviors, or an equivalent amount of experience involving in-water training of cetaceans, who serves as the head trainer for the SWTD program;

(3) Supervising attendant—at least one full-time staff member with at least 3 years experience involving human/dolphin interactions; and

(4) Attending veterinarian—at least one staff or consultant veterinarian who

has at least the equivalent of 2 years full-time experience with cetacean medicine within the past 10 years.

(d) *Program animals Only* *Tursiops truncatus* may be used in SWTD programs.

(e) *Handling.* (1) Interaction time for each dolphin shall not exceed 2 hours per day. Each participating dolphin shall have at least one period in each 24 hours of at least 10 continuous hours without public interaction.

(2) All dolphins used in an interactive session must be adequately trained and conditioned in human interaction so that they respond in the session to the attendants with appropriate behavior for safe interaction.

(3) The ratio of human participants to dolphins shall not exceed 3:1. The ratio of human participants to attendants shall not exceed 3:1.

(4) Prior to participating in a SWTD interaction session, members of the public must be provided with written rules and instructions for the session. Members of the public must agree, in writing, to abide by the rules and instructions before being allowed to participate in the session. Any participant who fails to follow the rules or instructions must be removed from the session.

(5) All interactive sessions must have at least two attendants. At least one attendant must be positioned in the water, except in cases where at least one attendant is positioned so as to be able to intervene during the session as quickly as if positioned in the water. However, if the program has had more than two incidents during interactive sessions that have been dangerous or harmful to either a dolphin or a human, at least one attendant must be positioned in the water.

(6) The SWTD program must limit interaction between dolphins and humans so that the interaction does not harm the dolphins, does not remove the element of choice from the dolphins, such as by recalling the animal from the sanctuary area, and does not elicit undesirable responses from the dolphins. The program must prohibit grasping or holding of the dolphin's body, unless under the direct and explicit instruction of an attendant eliciting a specific dolphin behavior, and must prevent the chasing or other harassment of the dolphins.

(7) In cases where dolphins used in an interactive session exhibit unsatisfactory behaviors, such as charging, biting, mouthing, or sexual contact with humans, these dolphins must either be removed from the interactive area or the session must be terminated. Written criteria must be

developed and submitted to APHIS<sup>6</sup> regarding conditions and procedures for the termination of a session when removal of a dolphin is not possible and potentially unsafe behaviors are exhibited by one or more dolphins. The primary behaviorist shall determine when operations will be terminated, and when they may resume. In the absence of the primary behaviorist, these determinations shall be made by the supervising attendant.

(f) *Recordkeeping.* (1) In order for APHIS to properly evaluate a proposed or an ongoing SWTD program, each facility must provide APHIS<sup>7</sup> with a description of its program at least 30 days prior to initiation of the program, or in the case of any program already in place, the description must be provided within 30 days from the effective date of this final rule. The description must include at least the following:

(i) Identification of each dolphin in the program, by means of name and/or number, sex, age, and any other means the Administrator determines to be necessary to adequately identify the dolphin;

(ii) A description of the educational content and agenda of planned interactive sessions, and the anticipated average and maximum frequency and duration of encounters per dolphin per day;

(iii) The content and method of pre-encounter orientation, rules, and instructions, including restrictions on types of physical contact with the dolphins;

(iv) A description of the SWTD facility, including the primary enclosure and other housing at the facility;

(v) A description of the training the dolphin has undergone or will undergo prior to participation in the program;

(vi) The *curriculum vitae* of all staff involved in the handling, care, and maintenance of the dolphins;

(vii) The current behavior patterns and health of each dolphin, to be assessed and submitted by the attending veterinarian;

(viii) A written program of veterinary care (APHIS form 7002), including protocols and schedules of professional visits; and

(ix) A detailed description of the monitoring program to be used to detect and identify changes in the behavior and health of the dolphins.

<sup>6</sup> Send to Administrator, c/o Animal and Plant Health Inspection Service, Regulatory Enforcement and Animal Care, Animal Care, 4700 River Road Unit 84, Riverdale, Maryland 20737-1234.

<sup>7</sup> Send to Administrator, c/o Animal and Plant Health Inspection Service, Regulatory Enforcement and Animal Care, Animal Care, 4700 River Road Unit 84, Riverdale, Maryland 20737-1234.

(2) In the case of a new SWTD program which APHIS finds deficient in any respect, the facility will be notified so that it may correct any deficiencies prior to the initiation of its program. In the case of an existing SWTD program which APHIS finds deficient in any respect, the facility will be notified of any deficiencies and provided the opportunity to make corrections.

(3) Individual animal veterinary records, including all examinations, laboratory reports, treatments, and necropsy reports must be kept at the SWTD site for at least 5 years and be made available to an APHIS official upon request during inspection:

(4) The following records must be kept at the SWTD site for at least 3 years and be made available to an APHIS official upon request during inspection:

(i) Individual dolphin feeding records; and

(ii) Individual dolphin behavioral records.

(5) The following reports must be kept at the SWTD site for at least 3 years and a copy must be submitted to APHIS<sup>8</sup> on a semi-annual basis:

(i) Statistical summaries of the number of minutes per day and the number of hours per week that each animal participated in an interactive session;

(ii) A statistical summary of the number of human participants per month in the SWTD program; and

(iii) A description of any changes made in the SWTD program since the previous report was submitted.

(6) All incidents resulting in injury to either dolphins or humans participating in an interactive session must be reported to APHIS within 24 hours of the incident.<sup>9</sup> Within 7 days of any such incident, a written report must be submitted to the Administrator.<sup>10</sup> The report must provide a detailed description of the incident and must establish a plan of action for the prevention of further occurrences.

(g) *Veterinary care.* (1) The attending veterinarian must conduct on-site evaluations of each dolphin at least once a month. The evaluation must include a visual inspection of the animal; examination of the behavioral, feeding, and medical records of the animal; and a discussion of each animal with an animal care staff member familiar with the animal.

(2) The attending veterinarian must observe an interactive swim session at the SWTD site at least once each month.

<sup>8</sup> See footnote 6.

<sup>9</sup> Telephone numbers for Regulatory Enforcement and Animal Care, APHIS, sector offices can be found in local telephone books.

<sup>10</sup> See footnote 6.

(3) The attending veterinarian must conduct a complete physical examination of each dolphin at least once every 6 months. The examination must include a profile of the dolphin, including the dolphin's identification (name and/or number, sex, and age), weight,<sup>11</sup> length, axillary girth, appetite, and behavior. The attending veterinarian must also conduct a general examination to evaluate body condition, skin, eyes, mouth, blow hole and cardio-respiratory system, genitalia, and feces (gastrointestinal status). The examination must also include a complete blood count and serum chemistry analysis. Fecal and blow hole smears must be obtained for cytology and parasite evaluation.

(4) The attending veterinarian must record the nutritional and reproductive status of each dolphin (whether in active breeding program, pregnant, or nursing).

(5) The attending veterinarian must examine water quality records and provide a written assessment, to stay at the SWTD site for at least 3 years, of the overall water quality during the preceding month.

(6) In the event that a dolphin dies, complete necropsy results, including all appropriate histopathology, must be recorded in the dolphin's individual file and be made available to APHIS officials during facility inspections, or as requested by APHIS. The necropsy must be performed within 48 hours of the dolphin's death, by a veterinarian experienced in marine mammal necropsies. If the necropsy is not performed within 3 hours of the discovery of the dolphin's death, the dolphin must be refrigerated until necropsy. Written results of the necropsy must be available in the dolphin's individual file within 7 days after death for gross pathology and within 45 days after death for histopathology.

Done in Washington, DC, this 18th day of January 1995.

**Lonnie J. King,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

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## SMALL BUSINESS ADMINISTRATION

### 13 CFR Part 121

#### Small Business Size Standards; Ostensible Subcontractor Rule and the Affiliation of Business Concerns Under Joint Venture Arrangements

AGENCY: Small Business Administration.

ACTION: Proposed rule.

**SUMMARY:** The Small Business Administration (SBA) is proposing a revision to its "ostensible subcontractor" rule as set forth in its affiliation regulation to permit small businesses to enter into subcontracts with certain public utilities for the lease and use of distribution facilities (telecommunication circuits, petroleum and natural gas pipelines, and electric transmission lines) without being considered affiliated with the public utility where the small business prime contractor adds meaningful value to the contract. This revision is being considered to take into account new business arrangements which have emerged as a result of deregulation of several public utility industries.

**DATES:** Comments must be submitted on or before March 24, 1995.

**ADDRESSES:** Send comments to: Gary M. Jackson, Assistant Administrator for Size Standards, 409 3rd Street, SW., Mail Code 6880, Washington, DC 20416.

**FOR FURTHER INFORMATION CONTACT:** Gary M. Jackson, Assistant Administrator for Size Standards, (202) 205-6618.

**SUPPLEMENTARY INFORMATION:** The SBA is proposing to revise its "ostensible subcontractor" rule as set forth in 13 Code of Federal Regulations (CFR) part 121.401(1)(4) with regard to affiliation arising from certain continuing arrangements. Under this regulation, affiliation is generally found to exist when one firm acting as a prime contractor enters into a subcontracting arrangement with another firm who, in turn, performs the "primary or vital requirements" of a contract. Under this arrangement, if the prime contractor is reliant upon the subcontractor to perform the contract to the extent that the subcontractor assumes a controlling role on the contract, then the relationship will be regarded by SBA as a joint venture with the two firms deemed affiliated under the "ostensible subcontractor" rule. The size of a joint venture is based on the combined revenues or number of employees, depending on the applicable size standard, of both firms. For a joint venture to be considered a small

business, its size cannot exceed the applicable size standard.

The SBA is considering a modification to this "ostensible subcontractor" rule by expressly excluding from its coverage subcontracting agreements for the lease and use of distribution facilities of public utilities for telecommunication circuits, petroleum and natural gas pipelines, and electrical transmission lines where the prime contractor lessee contributes meaningful value to the contract. This modification would allow small businesses to enter into certain arrangements with other businesses in the provision of public utility services to the government without being considered joint venturers and affiliates. The SBA is concerned, however, that such a modification could have the unintended effect of allowing a small business to act as a mere broker or intermediary on the behalf of a large business. This possible consequence, addressed in greater detail below, is an issue that the SBA will be examining carefully before making a final decision on this proposal. It should be noted that this proposed rule would specifically exempt a finding of affiliation based solely on subcontracting agreements between firms that lease and use the public utility's distribution facilities and the public utility who owns and maintains the facilities, but other relationships between the firms could still bring about a finding of affiliation.

The impact of several recent size appeal decisions issued by SBA's Office of Hearings and Appeals has led several small businesses to request that SBA reassess its regulations on joint ventures as applied to firms that lease telecommunications circuits. These decisions found resellers of long distance telecommunications services affiliated with the owner of the telephone circuits, on the basis that the provider of the lines would perform the "primary and vital requirements" on a government contract by providing, maintaining and repairing telecommunications circuits, and that, therefore, the relationship between the reseller and long distance provider should be regarded as a joint venture arrangement and the firms should be considered affiliated under the "ostensible subcontractor" rule. As a result of the existing regulation and these decisions, federal contracting opportunities have been placed in jeopardy for both small businesses and small disadvantaged businesses operating through lease arrangements for telecommunication lines and circuits. SBA believes that its size regulations should be re-evaluated in

<sup>11</sup> Weight may be measured either by scale or calculated using the following formulae:

Females: Natural log of body mass =  $-8.44 + 1.34$  (natural log of girth) + 1.28 (natural log of standard length)

Males: Natural log of body mass =  $-10.3 + 1.62$  (natural log of girth) + 1.38 (natural log of standard length)